STATE OF MAINE
PUBLIC UTILITIES COMMISSION

December 11, 2002

ORDER GRANTING
WAIVER

MAINE ENERGY AGGREGATION COMPANY
Request for Wavier of the Opt-Out Fee
Requirement of Chapter 301 Regarding
Maine Energy Aggregation Company

Docket No. 2002-468

CONSTELLATION POWER SOURCE MAINE, LLC
Request for Wavier of the Opt-Out Fee
Requirement of Chapter 301 Regarding
Constellation Power Source Maine, LLC

Docket No. 2002-606

BANGOR YOUNG MEN'S CHRISTIAN ASSOCIATION
Request for Wavier of the Opt-Out Fee
Requirement of Chapter 301 Regarding
Bangor Young Men's Christian Association

Docket No. 2002-699

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

By this Order, we grant requests of Maine Energy Aggregation Company (MEAC) and Constellation Power Source Maine, LLC (CPS Maine), on behalf on certain of their customers, and Bangor Young Men's Christian Association, on its own behalf, for waivers of the opt-out fee requirements of Chapter 301. The waivers apply to customers in the CMP and BHE service territories who were supplied electricity by Enron Services, Inc. (Enron) prior to Enron's bankruptcy, and who defaulted to standard offer service when their Enron service ended and before service with a new supplier began. We also waive the opt-out fee for similarly situated customers as described in this Order.

II. BACKGROUND

Chapter 301 of our rules governs the terms and conditions for standard offer service. Section 2(C)(2) of Chapter 301 requires customers to pay an opt-out fee if they return to standard offer service for less than 12 months after previously having purchased supply from a competitive electricity provider (CEP). The amount of the fee is twice the customer's highest standard offer bill, and it is assessed when the customer leaves standard offer service and re-enters the market. The fee is intended to discourage strategic switching between standard offer service and the competitive market, a practice that could increase standard offer costs to the detriment of customers that do not access the market.

On August 9, 2002, MEAC filed a request for a "generic waiver" of this provision of our rules. MEAC indicated that its request applied to customer accounts in the following three categories: (1) accounts that were "rejected" (in the bankruptcy context) by Enron in July 2002; (2) accounts that could in the future be rejected by Enron or bought out by the customer; and (3) accounts for which an Enron contract had expired in February or March 2002, but which Enron did not drop.[1] The request covers customers that MEAC had aggregated and arranged supply contracts for with Enron. The customers had (or would be) dropped to standard offer service when their Enron service ended and, when they enrolled with a new CEP, an opt-out fee had been (or would be) assessed. MEAC noted that the majority of its former-Enron accounts had been successfully enrolled with new suppliers without dropping to standard offer service, but for various reasons, this did not occur for these accounts.

Responses to the MEAC request were filed on August 20, 2002, by Central Maine Power Company (CMP) and, on August 23, 2002, by Select Energy, Inc. (Select).[2] CMP stated that it took no position with respect to whether the waivers should be granted, but noted administrative problems with granting waivers on a generic basis as proposed by MEAC. CMP recommended, instead, that MEAC or the affected customers be required to provide the Commission with specific evidence in the case of each account to support a waiver, and that the Commission should then provide CMP with lists of customers and account numbers for whom waivers were granted. CMP also raised questions about the policy basis for waivers under some of the circumstances described by MEAC's three categories. According to CMP, some could indicate "gaming" of the standard offer; customer-specific evidence would be necessary to determine that this was not the case before a waiver could be justified.

Select generally agreed with CMP's position. Select also indicated that, if the Commission were to grant the MEAC waiver request, it should apply only to customers who remained on standard offer service through Select's remaining term, ending February, 2003. Select stated that this would be an equitable balance in that customers would not be penalized by having to pay an opt-out fee as a result of the Enron bankruptcy, nor would Select be penalized by having to serve these customers during only the high cost summer months. Select also noted that its approach would solve many of the administrative problems cited by CMP.

On October 4, 2002, Constellation Power Source Maine, LLC (Constellation) filed a request for a waiver of the opt-out fee for four of its customers: Fisher Engineering, CN Brown, Maine State Retirement, and Stone & Cooper. Each of these customers

[1] Enron's delay in dropping accounts (the third category) would result in an opt-out fee being assessed to customers who return to the market when standard offer prices are re-set on March 1, 2003.

[2] Select is currently the standard offer supplier for the customers at issue.

was formerly served by Enron. Constellation had recently purchased a number of Enron's Maine accounts, but the list it provided to the utilities to implement the transfers omitted these accounts. As a result, the four customers dropped to standard offer service before eventually being enrolled with Constellation. Constellation stated that the drops to standard offer service by these customers were inadvertent and not related to gaming.

On November 15, 2002, Select filed its opposition to the Constellation waiver request. Select stated that it was due solely to the actions of Constellation that the customers dropped to standard offer service, with the result being that Select had to supply them during high-cost summer months. Select argued that the opt-out fee is intended to curb situations like this, or, in the alternative, compensate the standard offer supplier when they occur. Select suggested that Constellation could reimburse its customers if it feels they should not have to pay the opt-out fee.

III. DISCUSSION

The purpose of the opt-out fee is to discourage customers or suppliers from gaming standard offer service. As we use the term, gaming is the strategic use of standard offer service for economic benefits, such as switching between the market and standard offer service based on relative prices. Gaming requires that a customer or supplier makes affirmative choices between standard offer service and the competitive market with the objective being to lower electricity costs.

Since the opt-out fee has been in effect, we have granted several waiver requests on a case-by-case basis. In each, we found the waiver to be justified because there was no apparent gaming. The facts of the previous waiver cases vary, although typically the customer's drop to standard offer service was inadvertent or due to insufficient time to find a new supplier and negotiate contract terms. There has been only one case in which a waiver request was denied. *Order Denying Request for Opt-Out Fee Waiver*, Docket No. 2001-594 (Nov. 7, 2001). In that case, the facts indicated that decisions about whether to receive standard offer service or purchase from a CEP were made based on the relative prices of the services and, thus, the waiver was not justified.[3]

In the current cases, we have not considered the waivers on the categorical bases proposed by MEAC. Instead, we obtained and examined the drop and enrollment history for each CMP and BHE account with an opt-out fee pending. (This includes a large number of MEAC customers, the four customers on behalf of whom Constellation requested waivers, and the Bangor YMCA.) We found that, although there are more than 80 such accounts, their circumstances are the same in two respects: (1) they were being served by Enron at the time of its bankruptcy; and (2) they dropped to standard offer

[3] We reduced the opt-out fee by half due to mitigating circumstances.

service for a relatively short period of time before enrolling with a new supplier. In all cases, customers were re-enrolled with new suppliers in less than three months, and most were re-enrolled in less than two months.

We did not examine each customer's rationale or decision-making process, nor would it be practical in this case to do so. Moreover, such an examination is unnecessary in our view. The chaos created by the Enron bankruptcy, coupled with the time required to find and negotiate contract terms with a new supplier even under more normal conditions, provide sufficient basis upon which to conclude that the customers' actions are unlikely to be related to gaming. For many customers, the drop to standard offer was inadvertent and may have gone unnoticed for a period of time. In addition, the enrollment process itself creates a lag of up to one month because customers are typically enrolled on their regular meter read dates. Enron's bankruptcy, which, at least in part, caused the drops to standard offer in the first place, was obviously beyond the customers' control. Additionally, we consider enrollment with a new supplier within three months under the circumstances of these cases to be consistent with reasonable efforts to re-enter the market promptly.

We turn now to the points made by Select regarding fairness to the standard offer supplier. Select notes that, regardless of whether there was any intent to game, it had to bear increased costs to serve these customers because of another supplier's actions. Thus, as a matter of equity, it should receive the opt-out fee revenues as compensation. We do not agree. As noted above, the purpose of the fee is to deter strategic gaming of the standard offer. Although revenue from the opt-out fee would, indeed, flow to the standard offer supplier and might offset unanticipated costs, this is not the primary purpose of the fee and does not by itself justify its imposition in cases where gaming is not evident.

In our Order adopting changes to the applicable provisions of Chapter 301, we stated that waivers of the opt-out fee would be appropriate if the default to standard offer service were beyond the customer's control or otherwise not related to gaming the standard offer service. (*Order Adopting Rule and Statement of Factual and Policy Basis*, Docket No. 2000-904 at 4 (Jan. 4, 2001). Pursuant to Section 10 of Chapter 301, the Commission may waive any of the rule's requirements, provided that doing so would not be inconsistent with the purpose of the rule or related statutes. We find that, in the case of former Enron customers who dropped to standard offer service after Enron's bankruptcy and then returned to the market reasonably quickly, it is reasonable to assume that gaming was not involved, and, thus, a waiver of the opt-out fee requirement is not inconsistent with rule or statute. We therefore grant waivers for customers that: (1) were served by Enron at the time of its bankruptcy; and (2) dropped to standard offer

service for a period of 3 months or less.[4, 5] We note that granting waivers on this basis should also resolve the administrative concerns expressed by CMP about the MEAC's proposed "generic" approach.

As noted above, there are more than 80 accounts pending an opt-out fee. All accounts pending as of the date of this Order that meet these criteria are hereby granted waivers. In addition, it is our understanding that Enron completed the process of dropping its customers in October 2002. Based on this, customers for whom an opt-out fee is not currently pending, but who were dropped to standard offer service by Enron through October 2002, and who then re-enroll with a new CEP within 3 months of their drop date, are also hereby granted waivers of the opt-out fee.

We do not by this Order deny waivers for accounts (pending or future) that do not meet these criteria. Customers or CEPs may file anew for waivers in those cases.

Dated at Augusta, Maine, this 11th day of December, 2002.

BY ORDER OF THE COMMISSION

_____
Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

[4] Based on the drop/enrollment history provided by CMP and BHE, this appears to cover the Bangor YMCA, the four customers included in the Constellation waiver request and most, if not all, of the MEAC customers with opt-out fees currently pending.

[5] This does not imply that 3 months would be a reasonable length of time to remain on standard offer service between CEPs in all cases.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.